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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DEVON T. WHITE et al., Defendants and Appellants.	B292874 (Los Angeles County Super. Ct. No. GA101707)

APPEALS from judgments of the Superior Court of Los Angeles County, Michael D. Carter, Judge. Reversed with directions in part and affirmed in part.

Janyce Keiko Imata Blair, under appointment by the Court of Appeal, for Defendant and Appellant Devon T. White.

Stephen M. Vasil, under appointment by the Court of Appeal, for Defendant and Appellant James Wesley Trotter.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Steven D. Matthews and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Devon T. White and James Wesley Trotter followed Hye Soon Oh to her home where White robbed and shot Oh, killing her, while Trotter waited nearby in a getaway car. A jury found both defendants guilty of special circumstance murder. On appeal, we reject White's contentions that instructional errors require reversal of the judgment. However, we agree with Trotter that there was insufficient evidence to support the special circumstance as to him. We therefore reverse the judgment as to Trotter but affirm it as to White.

BACKGROUND[1]

I. August 8, 2017: the murder

Oh and her husband lived in La Crescenta in a condominium complex. They worked in Lynwood, where they owned a clothing store in the Plaza Mexico mall. The store made $500 to $700 a day in cash. Either Oh or her husband would take the money home each night.

On the morning of August 8, 2017, Oh drove to the store, where she stayed until it closed that evening. Before leaving, Oh put the store's cash in her purse. Just after 8:00 p.m., Oh drove out of Plaza Mexico's parking lot, followed by a red Dodge Challenger driven by Trotter and in which White and Tonaye James, Trotter's girlfriend, were passengers.

Oh drove home.

At 8:36 p.m., a witness was walking in the area of Oh's condominium complex. The witness's attention was drawn to a red Dodge Challenger which had driven up with all its lights off

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[1] We do not summarize gang evidence, as the jury found the gang allegations not true.

and had parked close to other cars on the street. When White got out of the car, Trotter positioned it near the condominium's driveway. As an automated gate to the driveway was closing, White blocked it and entered the complex, moving toward the garage area. The witness heard a woman scream and then a gunshot. White came running down the driveway and got back into the car, which sped away. The witness estimated that 30 seconds elapsed from when White entered the complex to when he exited.

A second witness looked out the window after hearing a "big boom" and saw White running down the driveway carrying a bag and gun.

Oh was found in her garage, part of her body still in her car, dead from a gunshot wound to the chest.

II. The investigation

Oh's body had no soot or stippling, consistent with the shooter being more than two feet from her.

The day after the murder, Oh's purse was found where the southbound 2 and 5 freeways connect. White's DNA was found on the purse, which now contained no cash.

The murder weapon was never found. However, a .45-caliber shell casing was recovered from Oh's garage and a .45-caliber bullet was recovered from her body. The bullet could have been fired from either a Glock or Versa gun. Photos and video on Trotter's phone dated July and August 2017 show him with two Glock guns. However, a firearms expert could not verify they were real guns without physically examining them.

The morning of Oh's murder, White texted someone that he would probably "go thug with Man and go pass on something." Man Man is Trotter's moniker, and "to thug" means to commit

crimes. At 5:00 p.m., White texted Trotter that he was exiting the freeway and headed to the house.

At 5:20 p.m., Trotter and James were at Plaza Mexico. Video surveillance showed them walk by Oh's store and look in. Trotter appeared to use his cellphone. They left Plaza Mexico around 5:45 p.m. without having bought anything.

At 6:45 p.m., James and Trotter were at a nearby store, where James wired money to extend the rental of a red Dodge Challenger. They left Walmart at 7:25 p.m., and Trotter then called White twice. By 8:00 p.m., Trotter and White were at Plaza Mexico's parking lot, where Oh's car was parked. Video surveillance captured the Challenger following Oh. Later that evening, White and Trotter's cellphones connected to cellphone towers in the area of Oh's home soon after she was shot. On the day of Oh's murder, Trotter's, White's, and James's cellphones travelled from Lynwood to Compton to La Crescenta and back to Compton.

Later that night, Trotter filmed himself with $20 and $100 bills spread across a bed as he said, "All off the bitch you know. All off the bitch, the night just barely started. . . . My night ain't even started yet. I ain't even kicked out yet. I ain't even did nothing yet. This is right now. It ain't two, three o'clock in the morning, you know. All off the bitch all night."

On the day of and in the days after Oh's murder, searches relating to Oh's murder were run on White's and Trotter's cellphones.

III. Verdict and sentence[2]

The jury found White and Trotter guilty of first degree murder with a special circumstance finding that the murder was committed during a robbery (Pen. Code,[3] §§ 187, subd. (a), 190.2, subd. (a)(17)(A); count 1), robbery (§ 211; count 2), and possession of a firearm by a prohibited person (§ 29800, subd. (a)(1); counts 3 [White] & 4 [Trotter]). As to the murder and robbery counts, the jury found true personal (§ 12022.53, subd. (d)) and principal (*id.*, subds. (d) & (e)(1)) gun use allegations as to White and principal gun use allegations as to Trotter (*id.*, subds. (d) & (e)(1)). As to both defendants, the jury found gang allegations not true.

On August 29, 2018, the trial court sentenced White to life without the possibility of parole (LWOP) on count 1. The trial court stayed sentences on the remaining counts and firearm enhancements.

On September 25, 2018, the trial court sentenced Trotter to LWOP on count 1 and stayed sentences on the remaining counts and on the firearm enhancements. The trial court did not impose sentences on prior conviction allegations that had been found true.

CONTENTIONS

Defendants raise different contentions on appeal. White contends that the jury was improperly instructed on malice murder, unanimity, and being a prohibited person with a

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[2] James was charged with Oh's murder and with robbery, but she entered into a plea agreement.

[3] All further statutory references are to the Penal Code unless otherwise indicated.

gun. He also contends we should remand for a hearing on his ability to pay restitution and fines. White joins Trotter's arguments that may accrue to White's benefit.

Trotter contends that there was insufficient evidence to support the true finding on the special circumstance allegation, that the special circumstance instruction was erroneous, the trial court should have dismissed the gang allegations after the preliminary hearing, and the sentencing and clerical errors must be corrected.

DISCUSSION

I. Instructional error

White contends the jury was not adequately informed that express and implied malice murder are of the second degree unless the People prove they are of the first degree, and further, the error could have led the jury to convict him of a crime on a less than unanimous verdict. We find any error harmless.

A. *Additional background*

While discussing jury instructions, the prosecution represented it would not argue that defendants were guilty of first or second degree murder based on malice aforethought. It would argue that they were guilty of first degree murder under a felony murder theory. Based on that representation, defense counsel agreed that the trial court did not have to give CALCRIM No. 521, which describes the premeditation, deliberation, and willfulness that elevates murder from second to first degree and which refers to the requirements of second degree murder based on express or implied malice. Defense counsel then asked for instruction on second degree murder and argued that the jury should be instructed on grand theft person on the theory that a

theft occurred after an accidental shooting. The trial court said there was already an instruction on second degree murder (apparently referring to CALCRIM No. 520) but refused to instruct on the grand theft theory.

The trial court then instructed the jury with CALCRIM No. 548 that White was being prosecuted for murder under two theories, felony murder and malice aforethought murder. Further, the jury could not find White guilty of murder unless all jurors agreed that the People had proved that White committed murder under at least one of these theories. CALCRIM No. 548 further instructed that jurors did not all have to agree on the same theory of murder but had to agree unanimously whether the murder was in the first or second degree.[4]

As to the first theory of murder, the trial court gave CALCRIM No. 540A regarding felony murder, robbery. As to the second theory of murder, the trial court gave CALCRIM No. 520, entitled first or second degree murder with malice aforethought. CALCRIM No. 520 told the jury that murder requires malice aforethought, which can be either express or implied. Express malice requires an intent to kill. (CALCRIM No. 520.) Implied malice requires an intentional act, the natural and probable consequences of which are dangerous to human life, defendant's knowledge that his act was dangerous to human life, and defendant deliberately acted with conscious disregard for human life. (CALCRIM No. 520.) However, the trial court omitted from the instruction that all express and implied malice murders are of the second degree unless the prosecution proves beyond a

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[4] The defense did not object to CALCRIM No. 548.

reasonable doubt that the murder is of the first degree. (See, e.g., § 189, subds. (a), (b).)

After the trial court so instructed the jury, White's counsel said, "I did not catch it before today, but there is talk of a second-degree murder as a less[e]r, and a first-degree murder; but it never gives the definition of how you would get to that. I did not see where there is premeditated versus willful and deliberate." The prosecutor repeated that he was proceeding on a "pure felony murder" theory and that second degree murder "could be malice or implied [malice] murder." Without further comment, the parties made their closing arguments.

B. *Forfeiture and invited error*

We first reject the People's argument that White forfeited his claims of instructional error or invited any error. The record shows that everyone agreed the jury should be instructed on second degree murder but nobody, including defense counsel, realized the potential impact of omitting the statement in CALCRIM No. 520 that malice murders are of the second degree unless the prosecution proves otherwise. White's counsel alluded to this when, immediately after instructions had been read, he suggested the jury had not been told how it could find first degree murder. But he did not pursue the issue. Nonetheless, even if he should have asked for additional instruction, we may review a claim of instructional error when a defendant's substantial rights are affected. (§ 1259.)

C. *Any error was harmless*

White contends that the trial court failed to instruct the jury that malice murder is of the second degree *unless* the prosecution proves otherwise, which error could have led the jury

to convict him of first degree murder even if it believed he acted either without premeditation or with only implied malice. We disagree.

A trial court has a sua sponte duty to instruct the jury on the general principles of law relevant to the issues raised by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) Even absent a sua sponte duty to instruct on a legal point, when it does instruct, it must do so correctly. (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1331.) A trial court, however, "has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal." (*People v. Lee* (2011) 51 Cal.4th 620, 638.) We determine the correctness of an instruction from the entirety of the instructions given to the jury. (*People v. Young* (2005) 34 Cal.4th 1149, 1202.) We consider whether it is reasonably likely the jury could have understood the instruction in the manner the defendant asserts, examining the entire record, including other instructions and arguments of counsel. (*Ibid.*)

We review any nonstructural state law error under the standard in *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Gonzalez* (2019) 5 Cal.5th 186, 195.) Under that standard, we evaluate whether the defendant has demonstrated a reasonable probability a more favorable result would have been reached in the absence of the error. (*Id.* at pp. 195–196.) Based on the totality of the record, we cannot make that finding here.

At most, the instructions here were incomplete, not legally erroneous. That is, CALCRIM No. 520 correctly described express and implied malice murder. To the extent it would have

been helpful to explain to the jury that an express or implied malice murder is of the second degree unless the prosecution proves it was of the first degree, this missing language would have merely amplified what was otherwise clear: the only theory of first degree murder before the jury was felony murder.

Stated otherwise, the jury would not have found White guilty of first degree murder on a theory of malice aforethought or without finding the requisite premeditation, because felony murder was the only theory of first degree murder before the jury. CALCRIM No. 540A stated, White "is charged in Count ONE with murder, *under a theory of felony murder*. [¶] To prove that [White] is guilty of first degree murder under this theory," the People had to prove the elements of robbery. (Italics added.) Thus, in closing argument, the prosecutor said he would talk about robbery first, because if defendants "are guilty of the robbery. They are guilty of the murder." He proceeded to argue that defendants were guilty of felony murder based on having committed a robbery and disavowed that this was a premeditated murder. In short, at no time did the prosecutor argue that White was guilty of first degree murder under a malice aforethought theory or because White acted with premeditation.[5]

Rather, malice aforethought was presented to the jury *only* as a theory of second degree murder. True, CALCRIM No. 548

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[5] White does not appear to argue that the jury was instructed on a legally invalid theory, i.e., that he could be guilty of first degree murder without a concomitant finding of premeditation or on a mere finding of implied malice. However, the jury received no such instruction, and, in any event, any error was harmless beyond a reasonable doubt. (See generally *People v. Aledamat* (2019) 8 Cal.5th 1, 13.)

instructed that White was being prosecuted for murder under two theories: malice aforethought and felony murder. However, the jury would have understood that malice aforethought was a theory of second degree murder, while felony murder was a theory of first degree murder. White's counsel argued that White was guilty of second degree implied malice murder, not felony murder. He argued that White had the mental capacity of a nine year old, so when Oh screamed, he became frightened, shot her, and then took her purse. Therefore, White "did not have the premeditation or an express malice, but he did something with implied malice involved that resulted in a second-degree murder."

In accord with this argument, the trial court instructed the jury that it could convict White of second degree murder. Multiple instructions informed the jury of that option. (See, e.g., CALCRIM Nos. 520, 548, 640, 3517.) CALCRIM No. 3517, for example, instructed that if the jury found defendants not guilty of the greater crime, it could find them guilty of the lesser crime, and that second degree murder is a lesser crime of first degree murder. Further, the second degree verdict forms stated, "We, the jury in the above-entitled cause, having found [White] Not Guilty of First Degree Murder, find" White guilty of second degree murder "in that he did unlawfully and with *malice aforethought*" murder Oh. (Italics added.) This again suggested that malice aforethought pertained only to second degree murder. Therefore, the jury knew it had the option of finding White guilty of second degree malice murder.

Finally, any error was harmless because the jury clearly rejected White's theory of second degree murder, as it found both defendants guilty of robbery and found true the special circumstance, which required a unanimous finding that

defendants committed or conspired to commit a robbery (CALCRIM Nos. 700, 730). In reaching these conclusions, the jury necessarily found that the intent to take Oh's purse or money was formed before or during the time White used force or fear, per CALCRIM No. 1600. The jury was instructed on CALCRIM No. 1600 which stated, "If the defendant did not form this required intent until after using the force or fear, then he or she did not commit robbery." Had the jury agreed with White that he did not form the requisite intent until *after* shooting Oh, then it would have found him not guilty of the robbery. Further, having found defendants guilty of robbery, the jury necessarily would find the special circumstance true. The only way in which the jury would have found the special circumstance not true is if it believed that White's intent all along had been to murder Oh and that the robbery was merely incidental to the murder. (See CALCRIM No. 730.)

For these reasons, we also reject White's argument that the alleged error deprived him of the right to a meaningful opportunity to present a complete defense and to adequate instruction on the defense theory of the case under the federal constitution. (See *Crane v. Kentucky* (1986) 476 U.S. 683, 690.) White's theory that he at most committed second degree implied malice murder was fully presented to the jury via the instructions, argument of counsel, and verdict forms. It was categorically rejected.

D. *Unanimity*

White makes the related contention that CALCRIM No. 548 was an incorrect statement of law in that it allowed him to be convicted of first degree murder, even if some jurors found he committed second degree malice aforethought murder while

others found he committed felony murder. For reasons similar to those stated above, we do not agree.

A criminal defendant has a constitutional right to a unanimous verdict that the defendant is guilty of a specific crime. (*People v. Russo* (2001) 25 Cal.4th 1124, 1131.) Where the evidence shows a single discrete crime but leaves room for disagreement as to how that crime was committed or what was the defendant's role, the jury need not unanimously agree on the theory of guilt. (*Id.* at p. 1132.) Simply put, the theory of guilt does not require unanimity but what crime was committed does. Accordingly, jurors were instructed with CALCRIM No. 548 that they could not find White guilty of murder unless they agreed he committed murder under one of two theories, i.e., malice aforethought or felony murder. CALCRIM No. 548 further told the jury it did not need to agree on the theory but had to unanimously agree on the degree of murder.

White now contends that because the two theories of murder resulted in different crimes—first or second degree murder—CALCRIM No. 548 incorrectly told the jury it need not agree on the theory of guilt. To support this contention, White cites *People v. Sanchez* (2013) 221 Cal.App.4th 1012 and *People v. Johnson* (2016) 243 Cal.App.4th 1247. In those cases, as here, two theories of murder were alleged, and the trial court instructed with CALCRIM No. 548. The version of CALCRIM No. 548 given in *Sanchez* and *Johnson* instructed jurors they did not have to agree on the theory of murder. *Sanchez* at page 1025 and *Johnson* at page 1280 found that telling the jury it did not have to agree on the theory of murder improperly suggested that unanimity also was not required as to the degree of murder. However, in response to *Sanchez* and *Johnson*, the judicial

council revised CALCRIM No. 548 to add language that although the jury need not agree on the theory of murder, it does have to agree on the degree of murder. (See generally *People v. Webb* (2018) 25 Cal.App.5th 901, 907.) That language was given here. Therefore, *Sanchez* and *Johnson* are distinguishable.

In any event, any error was harmless beyond a reasonable doubt. (See *People v. Webb*, *supra*, 25 Cal.App.5th at p. 907 [applying *Chapman v. California* (1967) 386 U.S. 18 review standard].) The jury would not have found White guilty of first degree murder under any theory other than felony murder for the simple reason that it was the only theory of first degree murder presented. True, the jury was told there were two theories of murder: malice aforethought murder and felony murder. And, notwithstanding that malice aforethought murder can be murder of the first or second degree, the jury was informed—via the instructions as a whole, the arguments of counsel, and verdict forms—that malice aforethought murder was before it *only* as a theory of second degree murder. First degree malice aforethought murder was not presented to the jury. The only reference to that theory was in CALCRIM No. 520's heading, which reads "First or Second Degree Murder With Malice Aforethought." That lone reference is simply not enough to find that the jury could have found defendants guilty under a theory on which it was otherwise not instructed. That is, the jury was not instructed with CALCRIM No. 521 on premeditation, and, moreover, the prosecutor did not argue premeditation. Beyond a

reasonable doubt, the jury here unanimously found White guilty of first degree murder under a felony murder theory.

II. Cumulative error

White claims that cumulative instructional errors deprived him of a fair trial. Since we have found no substantial error, we reject his claim of cumulative prejudicial error. (See *People v. Butler* (2009) 46 Cal.4th 847, 885.)

III. Stipulation to being a prohibited person

White was charged with being a convicted felon in possession of a firearm, under section 29800, subdivision (a)(1). To be guilty of that charge, a defendant must be a person prohibited from possessing a firearm, i.e., a felon. As to that charge, the trial court instructed the jury that the parties had stipulated defendants were prohibited persons, meaning persons not allowed to possess firearms. White now contends that the instruction was erroneous, because there was no such stipulation.

The record shows otherwise. Assent to a stipulation need not be made in a formal manner, and under the circumstances of a case where a party's counsel remains silent and makes no objection to the stipulation, his passive acquiescence may constitute assent to it. (*McBain v. Santa Clara Sav. & Loan Assn.* (1966) 241 Cal.App.2d 829, 838.) Here, while discussing the instruction, the trial court asked how the defense wanted to deal with the crime's third element. Trotter's counsel answered, "The defendant is a prohibited person, and the parties have stipulated thereto" and suggested that the trial court add to the instruction that the "parties have stipulated to element three." White's counsel remained silent. Later, when the trial court told the parties it had changed the instruction to read that "the

defendant and the People have stipulated or agreed that the defendant is a prohibited person" and that "it has been stipulated that the defendants are prohibited persons," Trotter's counsel said the language was fine. White's counsel again remained silent. Had he disagreed, he would have objected, as the stipulation clearly applied to "*defendants*" who were both prohibited "*persons*." (Italics added.)

It is clear that White's counsel did not object because he intended the stipulation to apply to his client. At White's sentencing hearing, the trial court asked if it was correctly recollecting that White admitted his felony status at trial. White's counsel said, "We used the term 'prohibited from using a firearm' to clean up the instruction, but the jury found that he did possess the prohibited firearm. The language that we used is 'felon with a firearm.' So I understand we just did that for the jury. Thus, White's counsel did not dispute that the stipulation applied to his client.

IV. Ability to pay hearing

As to White, the trial court imposed a $5,000 restitution fine under section 1202.4, subdivision (b). For each cause of action, the trial court also imposed a $30 court facility assessment (Gov. Code, § 70373), and a $40 court operations assessment (§ 1465.86). *People v. Dueñas* (2019) 30 Cal.App.5th 1157 held that such fines and assessments may not constitutionally be imposed absent evidence of the defendant's ability to pay. Any *Dueñas* issue was forfeited. That case concerned imposition of the minimum fine under section 1202.4, subdivision (b). (*Dueñas*, at p. 1162.) Where, as here, the trial court imposed a fine in excess of the minimum, the statute provides that a court may consider a defendant's inability to pay.

(§ 1202.4, subd. (d).) White did not object to the $5,000 fine thereby forfeiting any issue on appeal as to his ability to pay. (See *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154; *People v. Scott* (1994) 9 Cal.4th 331, 353.)

V. Sufficiency of the evidence to support special circumstance finding as to Trotter

The special circumstance statute provides that those who aid and abet first degree murder may be sentenced to LWOP (or death).[6] (§ 190.2, subds. (c), (d).) In the case of first degree felony murder, a special circumstance applies to those aiders and abettors who are major participants in the crime and who demonstrate reckless indifference to the grave risk of death created by their actions. (*People v. Banks* (2015) 61 Cal.4th 788, 794 (*Banks*).) To determine whether the special circumstance applies, felony murder participants are placed on a continuum. (*Id.* at p. 800.) At one end of the continuum are actual killers and aiders and abettors who intend to kill:[7] they are eligible for LWOP. (*Ibid.*) At the other end of the continuum are aiders and abettors who were not at the crime scene and who did not intend to kill or have any culpable mental state: they are ineligible for LWOP. (*Ibid.*) Somewhere between the ends of the continuum lies the constitutional minimum for LWOP eligibility.

To determine eligibility for this punishment, the aider and abettor must first be a major participant in the felony. Factors to make that determination are the defendant's role in planning the

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[6] The trial court denied the defense motion to dismiss the special circumstance allegation as to Trotter.

[7] The prosecution did not argue that Trotter had an intent to kill.

crime; whether the defendant supplied or used lethal weapons; whether the defendant knew of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants; the defendant's presence at the scene of the killing and whether the defendant was in a position to facilitate or prevent the murder and whether the defendant's conduct played a particular role in the death; and what the defendant did after lethal force was used. (*Banks*, *supra*, 61 Cal.4th at p. 803.)

Applying these factors, *Banks*, *supra*, 61 Cal.4th at page 811 held that the getaway-driver defendant in an armed robbery that resulted in the death of a security guard did not qualify for LWOP. There was no evidence the defendant planned the robbery, procured the weapons used, or that he or his accomplices had previously committed a violent crime. (*Id.* at pp. 795–796, 804–805.) Rather, the defendant dropped his accomplices off and waited a few blocks away. (*Id.* at p. 805.) Based on this evidence, the defendant was not a major participant. (*Id*. at p. 807; see *Enmund v. Florida* (1982) 458 U.S. 782 [getaway driver].)

After *Banks*, our California Supreme Court in *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*) elucidated what factors are relevant to determine the second requirement for LWOP eligibility, whether someone has acted with reckless indifference. Reckless indifference is the "willingness to kill (or to assist another in killing) to achieve a distinct aim, even if the defendant does not specifically desire that death as the outcome of his actions." (*Clark*, at p. 617.) The factors to determine whether an aider and abettor has acted with reckless indifference are: (1) the defendant's knowledge of weapons, and use and number of

weapons; (2) the defendant's presence at the crime and opportunities to prevent the murder and help the victim; (3) the duration of the felony; (4) the defendant's knowledge of a cohort's likelihood of killing; and (5) the defendant's efforts to minimize the risks of violence in the commission of the felony. (*Id.* at pp. 618–623.) Applying these factors to an armed robbery, *Clark* concluded that the getaway-driver defendant—who planned the crime but did not have a gun, was not physically present during the murder, and who tried to minimize the risk of violence by timing the robbery to occur after the store's closing and by planning to have the gun unloaded—did not act with reckless indifference to human life. (*Ibid.*)

We now apply these factors and the applicable sufficiency of the evidence standard of review, which asks whether there is evidence of reasonable, credible, and solid value, when viewed in the light most favorable to the prosecution, from which any rational trier of fact could have found the essential elements of the special circumstance allegation true beyond a reasonable doubt. (See *Clark*, *supra*, 63 Cal.4th at p. 610.) We proceed directly to the second prong, whether there is sufficient evidence Trotter acted with reckless indifference to human life and conclude, based on authority from our Supreme Court, there is not. (See *id.* at p. 614 [resolving only reckless indifference prong].)

The first factor relevant to this inquiry is Trotter's knowledge of weapons and use and number of weapons involved in the crime. Oh was murdered with a Glock firearm. In the months preceding Oh's death, Trotter had what appeared in photos and video to be Glocks but could not be verified as such. And as the guns were not recovered, whether one of the guns

depicted was the actual murder weapon also could not be verified. Therefore, at most, the evidence was that in the months preceding Oh's murder, Trotter had what may or may not have been Glocks and which cannot be determined to be the murder weapon. Even if this evidence raised a reasonable inference that Trotter supplied the murder weapon, his mere awareness that a gun would be used in the felony is insufficient to demonstrate the requisite indifference to human life. (See *Banks*, *supra*, 61 Cal.4th at p. 809.) Further, there is no evidence that Trotter was armed during the events, which undercuts a finding of reckless indifference.

Second, Trotter was not in the garage when White shot Oh. Trotter was waiting in the car at the end of the driveway and therefore did not have an immediate opportunity to prevent the murder. (See, e.g., *In re Scoggins* (June 25, 2020, S253155) ___ Cal.5th ___ [2020 WL 3525184, 6] [defendant absent from scene had no opportunity to restrain shooter]; *In re Miller* (2017) 14 Cal.App.5th 960, 975 [same]; *In re Taylor* (2019) 34 Cal.App.5th 543, 559 [same].) Also, given that White shot Oh almost immediately upon encountering her, it is not clear that Trotter could have interceded even if he were present at the scene. Trotter is therefore not like the defendant in *In re Loza* (2017) 10 Cal.App.5th 38, 54, who stood by while his accomplice counted down before shooting the victim and therefore acted with reckless indifference by failing to intercede. Also, fleeing the scene after the shooting does not necessarily establish reckless indifference, where, as here, there is no evidence the defendant appreciated the severity of the victim's injuries. (*Taylor*, at p. 559.) When "different inferences may be drawn from the circumstances, the defendant's actions after the shooting may not be very probative

of his or her mental state." (*Scoggins*, at p. ___ [2020 WL 3525184, 7].)

Third, the murder lasted under a minute. Conversely, there is a greater opportunity for violence where a victim is held at gunpoint, kidnapped, or otherwise restrained for prolonged periods. (*Clark*, *supra*, 63 Cal.4th at p. 620.) Here, 30 seconds elapsed from the time White first slipped through the gate to when he ran back to the car.

As to the fourth factor, there is no evidence Trotter knew that White had violent tendencies making it likely he would shoot Oh. White's prior conviction was for possessing narcotics for sale, and there is no evidence Trotter knew of even that limited criminal history. To the extent there is evidence White was a gang member, gang membership alone does not establish violent propensity. (*Banks*, *supra*, 61 Cal.4th at p. 805.) This evidence contrasts strongly with that in *Tison v. Arizona* (1987) 481 U.S. 137, 151 to 152, where the defendants knew that their father had killed in the past; yet they broke him out of prison, armed him, and stood by as he contemplated killing and then killed a family. As to Trotter's disgusting and reprehensible behavior *after* Oh was murdered—filming himself with money and saying it was "all off the bitch"—this callous indifference to Oh's death is not enough to show he knowingly created a grave risk of death before the murder. (See *In re Taylor*, *supra*, 34 Cal.App.5th at pp. 546–547, 560.)

Finally, the evidence does not show whether Trotter tried to minimize the risk of violence in the commission of the felony. There is no evidence, for example, that Trotter planned the time and place of the robbery to minimize the risk of violence or planned for the gun to be unloaded, like the defendant in *Clark*,

supra, 63 Cal.4th at page 622. Planning to rob Oh at home rather than at Plaza Mexico could merely suggest he wanted to minimize the risk of apprehension rather than heighten the risk of violence. While there is no evidence Trotter minimized the risk of violence, there is also no evidence he heightened that risk, by, for example, encouraging White to use lethal force. (See, e.g., *People v. Williams* (2015) 61 Cal.4th 1244, 1281 [instruction to shoot resisting victims shows reckless indifference].)

Considering all these factors together with the applicable legal precedent, we are compelled to conclude there is insufficient evidence that Trotter acted with reckless indifference. Because we reverse the true finding on the special circumstance, we need not address Trotter's contentions about instructional error and failure to dismiss the gang allegation.[8]

VI. Trotter: sentencing and clerical errors

As the People concede, sentencing and clerical errors must be corrected.

First, as to Trotter, the jury found true principal gun use allegations but not the gang allegations. Under these circumstances, a trial court must strike the gun enhancement, as a true finding on the gang enhancement is a prerequisite to imposing the gun enhancement for an aider and abettor. (§ 12022.53, subd. (e)(1); see *People v. Gonzales* (2001) 87 Cal.App.4th 1, 15.) The trial court here, however, stayed the gun enhancement. The sentence is therefore unauthorized and

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[8] As to that latter contention, the only prejudice that Trotter argues flowed from the alleged error pertains to the special circumstance finding.

must be corrected to reverse the true findings and to dismiss the gun enhancement.

Second, although the abstract of judgment correctly states the sentence, the August 15, 2018 minute order improperly states the jury found true that Trotter *personally* discharged a gun. The minute order must therefore be corrected to show that the jury found that a *principal* discharged a gun.

Third, the September 25, 2018 minute order incorrectly states that the trial court awarded zero days of actual custody, when in fact it awarded 391 days.

Fourth, the abstract of judgment correctly states that the trial court awarded 391 days of total credit but incorrectly states it was for local conduct instead of actual time served. The abstract of judgment must be corrected to reflect that this was an award of actual custody credits.

DISPOSITION

As to James Wesley Trotter, the true finding on the special circumstance allegation under Penal Code section 190.2, subdivision (a)(17)(A) is reversed and the special circumstance is dismissed. The true findings as to counts 1 and 2 under section 12022.53, subdivisions (d) and (e)(1) are reversed and the enhancements are dismissed. Accordingly, the trial court is directed to resentence Trotter. The trial court is directed (1) to correct the August 15, 2018 minute order to reflect that the jury found true an allegation under section 12022.53, subdivisions (d) and (e)(1) and not under subdivision (d) alone, (2) to correct the September 25, 2018 minute order to state that the trial court awarded 391 days of actual custody credits, and (3) to amend the abstract of judgment to state that the trial court awarded 391 days of actual custody credits and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

The judgment is affirmed as to Devon T. White.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

EGERTON, J.